In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 699

LOY VERNAL IMBODEN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 236-249) is reported at 194 F. 2d 508.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1952 (R. 235), and a petition for a rehearing was denied on March 17, 1952 (R. 251-261). The petition for a writ of certiorari was filed on April 11, 1952. The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Under Section 6 (j) of the Selective Service Act of 1948, a registrant whose claim of exemption from combatant training and service because of conscientious objections is denied by the local board may appeal to an appeal board. Before the appeal board acts, "The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned," and make a recommendation to the appeal board. Section 6(j) further provides that "The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board." The question is whether in such a hearing the withholding from petitioner of the names of, but not the information given by, confidential informants regarding the good faith of his conscientious objector claim, deprived him of rights under the Fifth and Sixth Amendments.

2. Whether Section 6(j) of the Selective Service Act of 1948 is unconstitutional in according exemption to those whose objection arises from religious training and belief, and not to those whose objection is based on a personal moral code.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix (*infra*, pp. 13-20).

STATEMENT

Petitioner was charged in a one-count indictment (R. 2), returned in the District Court for the Southern District of Ohio, with refusing to be inducted into the United States Army, in violation of 50 U.S.C. App. 462 and Regulation 1632.14 (*infra*, pp. 15, 20). The jury having found him guilty (R. 124, 141), the court sentenced him to imprisonment for five years (R. 145). On appeal (R. 146), the Court of Appeals unanimously affirmed the conviction (R. 235).

The evidence may be summarized in pertinent part as follows:

Petitioner, born on September 16, 1925 (R. 215), had obtained three agricultural deferments as a farm worker during World War II when such deferments were mandatory (R. 67, 87-88). On September 7, 1948, he registered under the 1948 Selective Service Act (R. 153-154). On September 28, 1948, he filed his classification questionnaire in which he stated that he was an agricultural worker and a conscientious objector (R. 155, 159, 161). On October 5, he filed a special form for conscientious objectors in which he stated that his religious convictions against war had been derived from Sunday school lessons and

sermons at the Brethren Church, that the individual upon whom he relied for guidance was Reverend Imboden [his father], and that his convictions had been demonstrated by his actions at home and at work (R. 163-166). On October 8 he was classified 1-A by his local draft board (R. 14, 44, 162).

At petitioner's request, the local board granted him a hearing on October 29 regarding a possible change in classification (R. 227, 231). At this hearing, petitioner urged exemption as a farmer and as a conscientious objector. The chairman of the board told him, "You realize you got out of that other war because you were essential * * *. As far as this new Selective Service is concerned there is going to be no farm deferment. * * * Before your farm produce was essential to feed the large armies, but now there is plenty of it." (R. 31-34, 45-47, 150-153.) Petitioner told the board, "I don't believe in it—in the army or navy or anything else" (R. 33, 152). The board continued petitioner's classification as 1-A (R. 162).

On November 10, 1948, petitioner appealed to the appeal board, which on January 18, 1949, affirmed his 1-A classification, determining that he should not be classified 1-A-O or IV-E, the two conscientious objector classifications (R. 162, 223-224). Meanwhile petitioner had passed his army physical examination, and was accepted for service but not inducted (R. 162, 195-198, 217, 228, 233).

On January 19, 1949, in accordance with 50 U.S.C. App. 456(j) and Regulation 1626.25 (*infra*, pp. 13-15, 16-20), the appeal board forwarded petitioner's file to the local United States Attorney so that he could obtain an advisory recommendation on the conscientious objector question from the Department of Justice (R. 182). On June 15, 1949, petitioner was notified by the Department of Justice's hearing officer that his hearing would take place on June 28, and on June 17 petitioner wrote the hearing officer requesting any unfavorable information tending to defeat his claim for exemption as a conscientious objector (R. 173-174). In a reply letter of June 23, the hearing officer referred to certain informants, without naming them, but identifying them as members or officials of the church, who had told F.B.I. investigators that they did not know anyone by the name of Imboden connected with the Glenford Brethren Church (where petitioner claimed attendance), that there were no available records to verify his entrance into this church, that this church never opposed universal military training, and that the question of military service was strictly a matter of individual feeling. The letter also stated that petitioner had previously been deferred as an essential agricultural worker rather than as a conscientious objector, and that his oldest brother did not at any time file a claim as a conscientious objector, but

had served in the United States Navy, and been released as an Ensign, attached to the United States Naval Reserve. (R. 174-176, 182-185.) At the hearing which was held on June 28, petitioner testified before the hearing officer about his claim as a conscientious objector and submitted proof by affidavit of his membership in the Brethren Church, and statements, including one from his father, to the effect that he had been taught opposition to strife (R. 51, 53-57, 176-181). After learning from the hearing officer that his file contained evidence obtained from ministers of the Brethren Church that its teachings were not opposed to universal military training, petitioner stated that he relied mostly on his own personal conviction respecting non-participation in war as a basis for his claim to exemption from military training (R. 38, 171). On July 8, the Department of Justice concurred in the hearing officer's recommendation against petitioner's claim on the ground that he had failed to prove that his objections were based upon conscientious convictions arising out of religious training and belief. The report of the hearing examiner states that "the evidence made available by the report of the Federal Bureau of Investigation tends to sustain the validity and propriety of such determination" (R. 35-39, 167-172). On September 17, 1949, the appeal board's 1-A classification was mailed to petitioner (R. 57, 162).

On July 17, 1950, petitioner was ordered to report for another physical examination which he passed on August 7 (R. 16, 57, 199-202, 230-231, 232-233). On September 8, 1950, he reported at Fort Hayes, Ohio, in response to a notice dated August 22 to report for induction (R. 162, 194). However, on two occasions he refused to take the required step forward to indicate his induction, and declined to sign a written statement that he refused to be inducted into the Army. He was then sent home from the Army camp. (R. 17, 26-27, 28-29, 60, 162, 187-189.)

ARGUMENT

1. Petitioner contends (Pet. 8-13) that his rights under the Fifth and Sixth Amendments were violated because the administrative order, which he was accused of disobeying, was issued after proceedings in which he was not given the names or allowed to confront adverse informants. The fundamental error in this argument is the premise that the draft board and hearing officer proceedings are part of a criminal trial. It was not the purpose of these proceedings to try petitioner for violation of a criminal law; he was merely accorded a hearing to determine his proper draft classification.

The purpose of the Selective Service system is to raise an army. It has long been settled that, in accomplishing that purpose, draft boards do not

act as courts, and draft registrants are not entitled to the constitutional safeguards applicable to criminal trials. See *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304; *Harris* v. *Ross*, 146 F. 2d 355 (C.A. 5); *Peterson* v. *United States*, 173 F. 2d 111, 115 (C.A. 6), certiorari denied, 337 U.S. 925; *Niznik* v. *United States*, 173 F. 2d 328, 336 (C.A. 6), certiorari denied, 337 U.S. 925; *United States* v. *Pitt*, 144 F. 2d 169, 172 (C.A. 3); *Ex parte Stanziale*, 138 F. 2d 312, 314 (C.A. 3), certiorari denied, 320 U.S. 797.

A criminal trial does not, as petitioner contends (Pet. 11), automatically follow the denial of a claim for exemption. Only a claimant's act of refusal to be inducted gives rise to a criminal trial. If he acts in conformity with the adverse ruling of the draft boards, as many conscientious objectors undoubtedly have done, he never becomes subject to a criminal trial for failure to submit to induction.

This Court in *Cox* v. *United States*, 332 U.S. 442, 453, and *Estep* v. *United States*, 327 U.S. 114, 121-122, clearly defined the scope of review available to one who undertakes wilfully to refuse to obey the administrative order. On his trial for such refusal, the trial court may pass on the validity of the order only to determine whether the draft board was acting within its jurisdiction and whether there was a basis in fact for the classification.

If petitioner's contention be interpreted as a claim that the refusal to disclose the names of the F.B.I. informants constituted such a violation of due process as to deprive the draft board of jurisdiction, the contention is clearly without merit. While petitioner was not given the names of the informants, he was fully advised as to the status of the informants[1] and the substance of their statements (R. 183-184). Cf. *Bailey* v. *Richardson,* 182 F. 2d 46, 55-57 (C.A. D.C.), affirmed, 341 U.S. 918. Petitioner, in rebuttal of the statements of the informants, produced several of his own written statements and affidavits of others, and he himself testified at length before the hearing officer (R. 37-38, 170-171, 176-181). The report of the hearing officer shows that his recommendation was based primarily on petitioner's own testimony, and that the statements of the F.B.I. informants were referred to merely as supporting the conclusion reached on the basis of petitioner's evidence.

Moreover, in requiring the Department of Justice to hold a hearing, "after appropriate inquiry," it is inconceivable that Congress intended to accord persons claiming exemption as conscientious objectors a right to a trial type of hearing which is not accorded to any other class of

[1] E.g. "an active member of the Glenford Brethren Church"; "an official of Glenford Brethren Church"; "an official of Ashland College" (R. 183).

registrants. Such a hearing is not required by due process of law, since there is no constitutional right to an exemption from military service. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 161. Also, in Section 13 (50 U.S.C. App. 463) Congress specifically provided that functions under the Selective Service Act should be exempted from the Administrative Procedure Act, thereby indicating a purpose not to elaborate and prolong the procedure of induction. Finally it should be noted that the inquiry and hearing conducted by the Department of Justice result merely in a recommendation which the appeal board may follow or reject as it sees fit. We believe that Congress intended that a hearing which is in no sense decisive should consist of an opportunity for the registrant to present his views, rather than a formal trial. This has been the Department's consistent interpretation of Section 6(j) (see petition for certiorari, p. 25).

2. Petitioner argues that Section 6(j) of the Selective Service Act of 1948, 50 U.S.C. App. 456(j) (*infra*, pp. 13-15) is unconstitutional in that it discriminates, in its classification of eligible conscientious objectors, against persons who, like himself, base their objections upon a personal moral code rather than upon religious training and belief (Pet. 13-15; R. 38, 171).

There is, however, no constitutional right to be relieved from service in the armed forces.

Jacobson v. *Massachusetts,* 197 U.S. 11; *Hamilton* v. *Regents,* 293 U.S. 245, 266. The privilege of deferment or exemption is a matter of grace granted by Congress on the terms which it sees fit to impose. While it may be, as petitioner argues, that Congress may not grant exemption on an arbitrary and capricious basis, it is clear that the legislative classification of persons to whom the privilege is accorded must be sustained if it rests on a rational basis. See *United Public Workers* v. *Mitchell,* 330 U.S. 75.

Clearly there is a rational basis for this legislative judgment that there is a distinction between those whose opposition to service is based upon religious training and belief in their relationship to a Supreme Being and those whose opposition stems from their own personal convictions.[2] Congress might well see fit to recognize the scruples of those who feel compelled to their position by such training and belief and not to recognize those who reach their conclusions on the basis of their own "essentially political, sociological, or philosophic

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[2] Under the 1940 Act there was an unresolved conflict as to whether persons whose conscientious objection was based on a personal moral code were exempt. Cf. *United States* v. *Berman,* 156 F. 2d 377 (C.A. 9), certiorari denied, 329 U.S. 795, with *United States ex rel. Reel* v. *Badt,* 141 F. 2d 845 (C.A. 2). The legislative history of the 1948 act, which specifically denied exemption to those whose objection is based on a personal moral code, shows that Congress intended the *Berman* view to prevail. Sen. Rep. No. 1268, 80th Congress, 2d sess., p. 14.

views or a merely personal moral code" (Section 6(j)).

The classification is also reasonable as a matter of practical administrative procedure. If each hopeful conscientious objector, in order to be deferred, were required only to state that he had a personal moral code opposed to participation in war in any form, the already difficult problem of raising an adequate army for our national defense would be made even more troublesome. The good faith of a conscientious objector who is a regular member of a church, the teachings of which unequivocally oppose participation in war in any form, is much more susceptible of accurate determination than the sincerity of one who merely states that his own personal moral code is to that effect. The Congressional judgment, founded as it is on a rational basis, must be accepted as conclusive.

CONCLUSION

The case was decided on settled principles of law, and there is no conflict in decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1952.

APPENDIX

The Selective Service Act of 1948 provides in pertinent part as follows:

Section 6 (j), 50 U.S.C. App. 456 (j), 62 Stat. 612-613:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from com-

batant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recom-

mendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Section 12 (a), 50 U.S.C. App. 462 (a), 62 Stat. 622:

> Any * * * person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall * * * be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

32 Code of Federal Regulations 1949 Edition provides in pertinent part as follows:

> § 1622.5 *Class I-A: Available for military service.* (a) In Class I-A shall be placed every registrant who is not eligible for classification in Class I-C and has failed to establish to the satisfaction of the local board, subject to appeal provided in this part, that

he is eligible for classification in another class.

§ 1624.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. * * *

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: * * * *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than Class I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class IV-E. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class IV-E, but does find that the registrant is eligible for classification in Class IV-E, it shall place him in that class.

(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class IV-E or in Class IV-E, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the "Minutes of Actions by Local Board and Appeal Board" on the Classification Questionaire (SSS Form No.

100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class IV-E under the circumstances set forth in paragraph (a) (2) or (4) of this section.

(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall

determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

§ 1632.14 *Duty of registrant to report for and submit to induction.* (a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. * * *

(b) Upon reporting for induction, it shall be the duty of the registrant * * * (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be acomplished, (5) to submit to induction, * * *.

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